A **MEUBAN ENGINEERING & EQUIPMENT SDN BHD**

v.

MBF INSURANS BHD

B HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-9-2002]
17 SEPTEMBER 2008

C ***INSURANCE:*** *Motor insurance - Loss or damage to car - Claim for - Whether defendant liable - Construction of policy - Ambiguity - Contra preferentum rule - Whether applicable - Whether ambiguous term construed against party who imposed it - Whether plaintiff entitled to damages*

D This was the plaintiff's claim against the defendants pursuant to an insurance policy in respect of accidental collision of a logging truck (the insured vehicle). Briefly, the plaintiff was claiming against the defendant for the payment of the sum RM420,000 together with interest being loss and damage suffered as a result of an E accident involving the plaintiff's reconditioned Mercedes Benz logging truck c/w trailer which was insured with the defendant under a Machinery and Equipment Insurance Policy. The said accident occurred when the plaintiff's employee suddenly lost control of the said logging truck due to the failure of its brake F thereby causing it to collide with the cliff by the roadside and being landed and dragged downhill along the said logging road and the deep water drain by the said logging road. The plaintiff's claim arose from the loss and damage sustained by the said logging truck in the said accident and was covered by cl. 1(a) of the said G insurance policy which provided that the defendant would indemnify the plaintiff against loss and damage caused to the said logging truck including its accessories and spare parts, whether by reason of accidental collision or overturning or otherwise from collision or overturning resulting from mechanical breakdown or H consequential wear and tear. The plaintiff made a claim under the said insurance policy and it was rejected by the defendant purportedly that it was excluded under exclusion cl. 4 of the said policy and by reason of the alleged failure of the plaintiffs in taking reasonable precaution to maintain the said logging truck in such I an efficient and safe condition. The defendant in reliance, on cl. 4, said they were not liable.

Held (allowing plaintiff's claim):

(1) The defendant was relying on a standard form contract which was prepared by the defendant and attempts to justify that the exclusion clause should apply when they have every opportunity to specifically direct the mind and draft the exclusion clause in a manner consistent with the intention of the parties. It was beyond doubt that the intention of the plaintiff was very clear that it wanted the insurance protection as stated in cl. 1(a) of the policy. The plaintiff through evidence have established according to law that the events stated in cl. 1(a) had occurred. The defendant's argument in reliance of cl. 4 could not be sustained as it was ambiguous. Clearly, the *contra preferentum* rule must be applied and the ambiguous term must be construed against the party who imposed it *ie*, the defendant. As the facts of the case were not substantially disputed, the plaintiff had established their case accordingly to law and was entitled to damages. (para 7)

[Order accordingly.]

Case(s) referred to:

Central Lorry Service Co Sdn Bhd v. American Insurance Co [1980] 1 LNS 175 ***(refd)***

Cornish v. Accident Insurance Co Ltd [1889] 23 QBD 453 ***(refd)***

English v. Western [1940] 2 KB 156 ***(refd)***

Harris v. Poland [1914] 1 KB 462 ***(refd)***

Houghton v. Trafalgar Insurance Co Ltd [1954] 1 QB 247 ***(refd)***

Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***

Provincial Insurance Co Ltd v. Yee Chee Swee [1984] 2 CLJ 12; [1984] 1 CLJ (Rep) 314 FC ***(refd)***

RHB Bank Berhad v. Dominance Timber Industries Sdn Bhd [2008] 1 LNS 702 ***(refd)***

For the plaintiffs - David Kuok; M/s Wong, Orlando Chua & Kuok Advocates

For the defendants - Cheng Hui Hong; M/s Cheng & Cheng Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' claim against the defendants pursuant to an insurance policy in respect of accidental collision of a logging truck which was the insured vehicle.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Brief Facts (Plaintiffs' Version)

[3] (a) the plaintiffs in this action is claiming against the defendants for the payment of the sum of RM420,000 together with interest being loss and damage suffered as a result of an accident involving the plaintiffs' reconditioned Mercedes Benz logging truck c/w trailer which was insured with the defendants under a Machinery and Equipment Insurance Policy.

(b) the said accident occurred when the plaintiffs' employee suddenly lost control of the said logging truck due to the failure of its brake thereby causing it to collide with the cliff by the road side and being landed and dragged downhill along the said logging road and the deep water drain by the said logging road.

(c) the plaintiffs' claim arises from the loss and damage sustained by the said logging truck in the said accident and is covered by the cl. 1(a) of the said insurance policy which provides that the defendant will indemnify the plaintiffs against loss and damage caused to the said

logging truck including its accessories and spare parts, whether by reason of accidental collision or overturning or otherwise from collision or overturning resulting from mechanical breakdown or consequential wear and tear.

(d) the plaintiffs made a claim under the said insurance policy and it was rejected by the defendants purportedly that it was excluded under exclusion cl. 4 of the said policy and by reason of the alleged failure of the plaintiffs in taking reasonable precaution to maintain the said logging truck in such an efficient and safe condition.

The defendants in reliance on cl. 4, say that they are not liable.

Preliminaries

[4] Three witnesses gave evidence for the plaintiffs and one witness for the defendants. There was not much challenge to the plaintiffs' evidence and the defendants were relying much on the adjuster's evidence DW1 as to the extent of damage and also his opinion as to the cause of accident. The plaintiffs say he is not qualified to do so. After having gone through his back ground and experience, I have very little doubt as to his ability to assess the quantum of damage, but not his ability to give evidence on mechanical defects as expert (See *RHB Bank Berhad v. Dominance Timber Industries Sdn Bhd* [2008] 1 LNS 702, High Court of Sibu, Suit No. 22-19-00 and S-22-55-02). As parties have agreed to refer the matter to the registrar for the purpose of assessment of damages, I shall not deal with that issue. However, in respect of the cause of the accident, his opinion relating to the same can only assist the court but cannot be the sole determining factor on the facts of this case.

Evidence

[5] In the instant case, the evidence of the plaintiffs were not substantially challenged save that cross-examination questions were speculative only. On the part of the defence, the defendants attempted to adduce evidence as pleaded in the statement of defence. The relevant part of the statement of defence reads as follows:

> It is an express exclusion contained in Clause 4 of the said policy that the defendant shall not be liable for, *inter alia*, loss or damage caused by any latent or mechanical defect, mechanical derangement, mechanical or electrical failures, breakages,

depreciation, atmospheric conditions or any other gradually operating cause in addition to any loss or damage resulting from any mechanical or electrical breakdown or wear and tear. In the event, the accident fell within the abovesaid exclusions.

Particulars

(a) the said accident was occasioned or contributed to by a heavy downpour which led to the road taken by the said logging truck being very slippery; or

(b) the said accident was occasioned by a brake failure arising from a mechanical or electrical failure, namely, that the brake system was faulty resulting in overheating and total brake failure; or

(c) the said accident was occasioned by an overheating of the engine moving parts such as the connecting rods and pistons while the said logging truck was driven at speed.

Further or alternatively, it is a condition of the said policy that the plaintiff shall, *inter alia*, take all reasonable precautions for the safety of the equipment insured, to maintain the same in efficient condition. In the event, the plaintiff failed to take such reasonable precautions or to maintain the said logging truck in such an efficient and safe condition.

Particulars

The defendant repeats its allegations contained in the particulars referred to above in paragraph 3 of the defence herein.

The defendant does not admit paragraph 3 of the Statement of Claim and puts the plaintiff to strict proof of the loss and damage as alleged.

Further or in the alternative, the defendant contends that the loss and damage to numerous items as claimed by the plaintiff were inconsistent to the accident and were not loss and damage sustained at the time of the said accident and is therefore not payable under the said policy.

Particulars

a) According to an inspection carried out on the said logging truck by the defendant's appointed adjuster, there was a gaping hole on the right side of the cylinder block and the oil pan, and this is inconsistent with the alleged collision impact which was concentrated on the front left side.

b) According to the said Adjuster's initial inspection on site, damage to the said logging truck was largely confined to the cabin, roll-over protection bars system, bumper and chasis frame, but at a reinspection later at Sibu, Sarawak, extensive damage was noted to the other section of the said logging truck, particularly the front and the rear undercarriage works.

As parties have agreed to the agreed issue being tried, it will be appropriate to direct the mind to the relevant clause the plaintiffs are relying on to succeed in the claim and the clause the defendants are relying on to exclude liability.

[6] Clause 1(a) of the policy which the plaintiff are relying on reads as follows:

a) accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear.

Exclusion clause which the defendants are relying on reads as follows:

Loss or damage caused by:

a) any latent or mechanical defect, mechanical derangement, mechanical or electrical failures, breakages, depreciation, atmospheric conditions or any other gradually operating cause.

b) mechanical or electrical breakdown or wear and tear.

c) overloading or strain.

From the statement of the defence, the defendants do not dispute any of the acts in cl. 1(a) namely collision or overturning. The other phrase such as mechanical breakdown or consequence of wear and tear creates ambiguity or overlap when contrasted with the phases in the exclusion cl. 4(a) and (b) for example is mechanical breakdown in cl. 1(a) the same as mechanical defect? In whose favour must the insurance policy be construed when the purpose of obtaining insurance policy was to protect the insured as stated in cl. 1(a) of the policy?

Contra Proferentem Rule And The Law

(1) The learned authors of Wikipedia encyclopedia, *inter alia* say: (i) *contra proferentem* is a rule of contractual interpretation which provides that an ambiguous term will be construed

against the party that imposed its inclusion in the contract or, more accurately, against (the interests of) the party who imposed it; (ii) the rule only applies if, and to the extent that, the clause was included at the unilateral insistence of one party without having been subject to negotiation by the other-party; (iii) additionally, the rule only applies if the court determines the term to be ambiguous, which often forms the substance of a contractual dispute; (iv) the reasoning behind this rule is to encourage the drafter of a contract to be as clear and explicit as possible and to take into account as many foreseeable situations as it can; (v) additionally, the rule reflects the court's inherent dislike of standard-form take-it-or-leave-it contracts also known as contracts of adhesion (eg, standard form insurance contracts for individual consumers, residential leases, etc). The court perceives such contracts to be the product of bargaining between parties in unfair or uneven positions; (vi) to mitigate this perceived unfairness, legal systems apply the doctrine of *contra proferentem*; giving the benefit of any doubt in favour of the party upon whom the contract was foisted; (vii) some courts when seeking a particular result will use *contra proferentem* to take a strict approach against insurers and other powerful contracting parties and go as far as to interpret terms of the contract in favor of the other party, even where the meaning of a term would appear clear and unambiguous on its face, although this application is disfavored.

(2) Support for the above proposition is found in a number of cases, to name a few are as follows: (a) *Cornish v. Accident Insurance Co. Ltd.* [1889] 23 QBD 453; (b) *English v. Western* [1940] 2 KB 156; (c) *Houghton v. Trafalgar Insurance Co. Ltd.* [1954] 1 QB 247; (d) *Harris v. Poland* [1914] 1 KB 462; (e) *Central Lorry Service Co. Sdn. Bhd. v. American Insurance Co.* [1980] 1 LNS 175. In *Malaysia National Insurance Sdn. Bhd. v. Malaysian Rubber Development Corp.* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 the Supreme Court held:

> [1] The interpretation of the relevant provisions of the insurance policy would depend on the facts of a particular case. The meaning of "transit" is essentially a question of fact – see *Sadler Brothers Company v. Meredith* [1963] 2 Lloyds Rep. 293 at 307. By virtue of the schedule to the policy, transit did not end at the godown at Sungei Way but only when the goods arrived at Port Klang.

[2] The learned Judge was right in holding that the burden of proving Exception No. 6 of the policy was on the appellant who was relying on the exception to escape liability. When certain provisions of the policy were ambiguous, the *contra proferentum* rule must be invoked construing the policy. However if there is no ambiguity in the language of the policy the appellant was still liable to indemnify the respondent – *Bond Air Services Limited v. Hill* [1955] 2 QB 417 & 428. On the evidence the appellant had failed to discharge that burden.

(g) *Provincial Insurance Co. Ltd. v. Yee Chee Swee* [1984] 2 CLJ 12; [1984] 1 CLJ (Rep) 314 the Federal Court stated:

…

[2] A policy of insurance is basically subject to the same rules of construction as any other written contract. Words used in it must be given their plain, ordinary meaning but in the context of the policy looked at as a whole and subject to any special definitions contained in the policy.

[3] The word "participation" is important in reading Exception 6. As such the *maxim noscitur a sociis* should be applied in construing the word "motor-cycling" not in its ordinary sense but motor-cycling in some form of sports or exhibition or competition.

[7] I have heard the evidence, read the documents and submissions filed herein in detail. I take the view that the plaintiffs' claim must be allowed. My reasons are as follows:

(a) In this case, the defendants are relying on a standard form contract which was prepared by the defendants themselves and attempts to justify that the exclusion clause should apply when they have every opportunity to specifically direct the mind and draft the exclusion clause in a manner consistent with the intention of the parties. In this case, it is beyond doubt the intention of the plaintiffs are very clear that it wanted the insurance protection as stated in cl. 1(a) of the policy. It is my finding that the plaintiffs through the evidence have established according to law that the events stated in cl. 1(a) had occurred. The defendants' argument in reliance of clause 4 cannot be sustained as it is ambiguous for reasons I have adumbrated earlier. Clearly, the *contra profentum* rule must be applied and the ambiguous term must be construed against the party who imposed it ie, the defendants.

A (b) As the facts of the case are not substantially disputed, it is my finding the plaintiffs had established their case accordingly to law and entitled for damages.

[8] For reasons stated above, I allow the plaintiffs' claim with
B costs and damages to be assessed before the registrar if the quantum cannot be agreed. The getting up fees shall not exceed RM30,000. If costs cannot be agreed the plaintiffs are at liability to tax the costs. The sum of damages shall carry interest as prayed in the statement of claim, from 25 March 1999.

C I hereby order so.

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